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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 LEVI MICAH BARTER,
13 Petitioner,

14 v.

15 JERRY BROWN, et al.,
16 Respondents.
17

No. CV 14-2418-DMG (PLA)

**ORDER DISMISSING PETITION FOR LACK
OF EXHAUSTION**

18 **INTRODUCTION**

19 On March 31, 2014, petitioner, who is currently in state custody, filed a Petition for Writ of
20 Habeas Corpus (the "Petition"). In the Petition, petitioner challenges his 2009 conviction and
21 sentence in the Los Angeles County Superior Court under California Penal Code §§ 245(a)(1),
22 12022.7(a). (See Petition at 1-2). On April 3, 2014, because the Petition indicated that none of
23 petitioner's four grounds for relief was exhausted (see Petition at 6-9), the Magistrate Judge
24 ordered petitioner to show cause why the Petition should not be dismissed without prejudice for
25 failure to exhaust state remedies. The Magistrate Judge further instructed that a petitioner
26 seeking habeas corpus relief must name the state officer having custody of him or her as the
27 respondent to a petition, and indicated that the instant Petition does not name the proper
28 respondent for a habeas proceeding. Petitioner was advised that the filing of an Amended Petition

1 on the Central District of California's form Petition for Writ of Habeas Corpus clearly showing that
 2 he has exhausted his state judicial remedies and naming a proper respondent would be deemed
 3 compliance with the Order to Show Cause.¹

4 On April 23, 2014, instead of filing an Amended Petition on the proper form, petitioner sent
 5 to the Court a "Petition for Writ of Mandamus - Order to Compel[] Judges 'Romero and Farrari' to
 6 'Adjudicate' Judge Lua's 'Order' on Resentencing Pursuant to Appendi" ("Response"), which the
 7 Court construes as petitioner's response to the Magistrate Judge's Order to Show Cause. In his
 8 Response, petitioner appears to assert, among other things, that his case is not being
 9 "adjudicated" in state court, and that petitioner "has been placed into a ... 'legal limbo,'" because
 10 of the "refus[al]" of state court judges to "adjudicate." (See Response).

11 12 DISCUSSION

13 As a matter of comity, a federal court will not entertain a habeas corpus petition unless the
 14 petitioner has exhausted the available state judicial remedies on every ground presented in the
 15 petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The
 16 habeas statute explicitly provides that a habeas petition brought by a person in state custody "shall
 17 not be granted unless it appears that -- (A) the applicant has exhausted the remedies available
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19 ¹ On April 1, 2014, a Petition for Habeas Corpus by a Person in State Custody, also filed
 20 by petitioner, was transferred to this Court from the United States District Court for the Eastern
 21 District of California in Case No. CV 14-2593-DMG (PLA) ("Eastern District Petition"). In the
 22 Eastern District Petition, petitioner challenges the same conviction and sentence, raising the same
 23 four grounds for relief as in the instant Petition, but failing to clearly indicate whether those
 24 grounds have been fully exhausted in the state courts. (See Eastern District Petition at 3-6). In
 25 an April 11, 2014, Order to Show Cause, the Magistrate Judge ordered petitioner to show in an
 26 Amended Petition that he has, in fact, exhausted his state judicial remedies, and warned petitioner
 27 that his failure to show that he has so exhausted would result in the action being dismissed for lack
 28 of exhaustion. (See Case No. CV 14-2593-DMG (PLA), Docket No. 17).

On April 17, 2014, a Petition for Habeas Corpus by a Person in State Custody, again filed
 by petitioner, was transferred to this Court from the United States District Court for the Southern
 District of California in Case No. CV 14-3089-DMG (PLA) ("Southern District Petition"). In the
 Southern District Petition, petitioner also challenges the same conviction and sentence, raises
 essentially the same four grounds for relief as in the instant Petition and the Eastern District
 Petition, and once again indicates that none of those grounds has been exhausted in the state
 courts. (See Southern District Petition at 6-9).

1 in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii)
 2 circumstances exist that render such process ineffective to protect the rights of the applicant.” 28
 3 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived
 4 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

5 Exhaustion requires that petitioner’s contentions be fairly presented to the state supreme
 6 court even if that court’s review is discretionary. O’Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119
 7 S.Ct. 1728, 144 L.Ed.2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077 n.3 (9th Cir. 2000).
 8 Petitioner must give the state courts “one full opportunity to resolve any constitutional issues by
 9 invoking one complete round of the State’s established appellate review process” in order to
 10 exhaust his claims. O’Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the
 11 prisoner has described in the state court proceedings both the operative facts and the federal legal
 12 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887,
 13 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438
 14 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. California Dep’t of
 15 Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,
 16 218 F.3d 1017 (9th Cir. 2000). Petitioner has the burden of demonstrating that he has exhausted
 17 available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

18 Here, petitioner has not exhausted his state judicial remedies in connection with this matter.
 19 (See Petition at 2-9). In addition to specifically indicating in his Petition that he has not filed any
 20 “petitions, applications, or motions . . . with respect to this judgment” in the California Court of
 21 Appeal or the California Supreme Court (see Petition at 3-4), petitioner also specifically
 22 acknowledges that he has not raised any of the four grounds for relief in the instant Petition in the
 23 California Supreme Court. (See Petition at 6-9). Petitioner fails to explain how any asserted
 24 “refus[al] to adjudicate” by the state courts has made it impossible for petitioner to file a state
 25 habeas petition in the California Supreme Court, and additionally fails to demonstrate any lack of
 26 available state corrective process, or to explain how any such process would be ineffective to
 27 protect his rights. See 28 U.S.C. § 2254(b)(1). Because the instant Petition is unexhausted, it is
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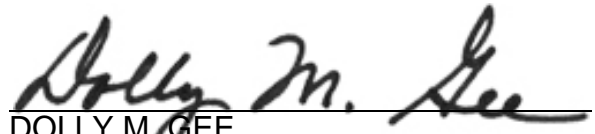
1 subject to being dismissed without prejudice. Greenawalt v. Stewart, 105 F.3d 1268, 1271, 1273-
 2 75 (9th Cir. 1997).

3 Further, a petitioner seeking habeas corpus relief must name the state officer having
 4 custody of him or her as the respondent to the Petition. See Rule 2(a), Rules Governing Section
 5 2254 Cases in the United States District Courts. This person typically is the warden of the facility
 6 in which the petitioner is incarcerated. Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th
 7 Cir. 1994); Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam) (explaining
 8 that a federal habeas petitioner's immediate custodian is the only party that can actually produce
 9 "the body" of the petitioner); Dunne v. Henman, 875 F.2d 244, 249 (9th Cir. 1989) (holding that
 10 where a prisoner files a § 2241 petition challenging the manner of execution of his sentence, the
 11 "prisoner must name the warden of the penitentiary where he is confined as respondent"). See
 12 also Ortiz-Sandoval v. Gomez, 81 F.3d 891, 895-96 (9th Cir. 1996), as amended (holding that
 13 California Director of Corrections may, under certain circumstances, be properly named as a
 14 respondent in a habeas action). Failure to name the correct respondent deprives federal courts
 15 of personal jurisdiction. Stanley, 21 F.3d at 360; Dunne, 875 F.2d at 249. As the current Petition
 16 does not name the proper respondent for a habeas proceeding, this Court lacks jurisdiction to
 17 entertain the action.

18 19 CONCLUSION

20 In light of the foregoing, the Court finds that it is appropriate to dismiss the Petition for
 21 failure to exhaust state judicial remedies and for failure to name a proper respondent. IT IS
 22 THEREFORE ORDERED that this action is **dismissed without prejudice**.

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24 DATED: April 29, 2014

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 26 DOLLY M. GEE
 27 UNITED STATES DISTRICT JUDGE
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